

Does a Provider's Waiver of Copays Raise a Red Flag?

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Providers sometimes waive cost-sharing amounts (e.g., copays or deductibles) as an accommodation to the patient, professional courtesy, employee benefit, or even for marketing reasons. Providers must be cautious because routine waivers could implicate fraud and abuse laws. On the federal side, the Office of the Inspector General (OIG) has confirmed that if the waiver is due to the genuine financial hardship of the patient and certain due diligence is followed, a waiver will not be deemed a violation of federal law.

However, the question does not end there. Private payor contracts generally require the provider to collect copays and deductibles. Failure to do so could violate the contract terms and could result in claims for breach of contract or repayment. This is exactly what occurred in the recent decision of a NYS appellate court in *Oxford Health Plans (NY), Inc. v. Biomed Pharms., Inc.*, 122 N.Y.S.3d 47 (2d Dep't March 18, 2020).

The defendant in this case, Biomed, was a pharmacy and home infusion service that provided services to patients suffering from chronic disorders such as hemophilia and immunodeficiency disorders. Biomed submitted claims to Oxford Health Plans, a health maintenance organization, as an out-of-network provider. The claim form did not address the collection of deductibles, co-insurance, or copays; the financial condition of the patient; or whether the patient requested or received a financial hardship waiver.

Oxford reimbursed Biomed at 70 percent of the "usual, customary, and reasonable" rates and withheld amounts representing patient co-pays or deductibles. Biomed then billed patients directly for the balance. At that point, patients were allowed to apply for financial hardship waivers for all or some of the amounts owed. Significantly, waivers were not routinely awarded by Biomed, nor were they used to attract patients or influence patient choice. Oxford's contract did not bar the use of financial hardship waivers or provide guidelines on their use. Further, Oxford did not require notice if patients sought financial hardship waivers.

Oxford determined Biomed improperly waived coinsurance and deductible payments for six patients, totaling approximately \$1.5 million. In response, Biomed commenced an action in federal court under the Employee Retirement Income Security Act. This lawsuit was dismissed in part because Biomed failed to collect financial information from the patients to substantiate hardship waivers. Thereafter, Oxford sued Biomed in NYS Supreme Court, alleging Biomed had fraudulently misrepresented billed charges and tortiously interfered with Oxford's contracts by waiving patients' deductible and coinsurance obligations. The lower court dismissed the case, and Oxford appealed.

On appeal, the Second Department affirmed the dismissal of Oxford's lawsuit, holding there were no misrepresentations. Biomed did not mislead Oxford regarding the financial condition of its patients or whether they requested or obtained financial hardship waivers. Biomed did not omit any material fact in the submission of its claims for reimbursement. Moreover, Oxford's contract of coverage did not preclude financial hardship waivers, nor did it require disclosure of

any waivers to Oxford. Finally, there was no evidence that Biomed waived patient co-pays in an attempt to defraud Oxford. While Oxford contended it would have paid Biomed significantly less had it known the provider was charging its patients lower rates, it was irrelevant because Oxford paid Biomed based upon customary and reasonable rates rather than Biomed's billed charges.

The Biomed case is instructive to providers as a reminder to follow best practices in granting hardship waivers. Federal law allows waivers of copays and deductibles if all of the following conditions are satisfied:

1. The waiver is not offered as part of any advertisement or solicitation
2. The person does not routinely waive coinsurance or deductible amounts
3. The person waives the coinsurance and deductible amounts after determining in good faith that the individual is in financial need or fails to collect coinsurance or deductible amounts after making reasonable collection efforts

Health care providers should review and, if necessary, update their policies and practices as well as train their staff concerning waiving copays and deductibles to ensure compliance. To be safe, providers should work with their significant private payors to confirm the situations in which the provider would be allowed to forego collecting cost-sharing amounts, such as documented financial hardship.

At minimum, providers must maintain documentation internally that justifies granting a waiver. This documentation should include information on the patient's financial status, the patient's request and reason for a waiver, and the reason why the waiver was awarded to the patient. Lastly, providers should also take caution to ensure the use of financial hardship waivers does not appear to influence patient choice, referral of patients, or anything else that could be construed to run afoul of a state or federal anti-fraud statute.

In sum, addressing the issue upfront may avoid costly repayments or adverse claims against providers in the future.

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